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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-327

DONALD H. WOOD,

Petitioner,

v.

UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS

[redacted]

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BRIEF FOR PETITIONER

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered on June 27, 1975, denying a rehearing on the opinion of May 9, 1975, of the Court of Claims granting summary judgment against the petitioner.

OPINION BELOW

The opinion of the Court of Claims is reported at Ct.Cl.

The opinion is appended to the petition in the appendix at pp. App. 1-3.

JURISDICTION

The jurisdiction of this Court is invoked under Section 1255, Title 28, United States Code, Section 5596, Title 5, U.S. Code and Section 1491, Title 28, U.S. Code.

THE QUESTIONS PRESENTED FOR REVIEW AND STATUTES

1. May an employee of the United States who has a right to be retained under Public Law 89-554, as amended (80 Statutes 428, as amended; 5 U.S.C. Secs. 3501 through 3504) be deprived of his position by having that position distinguished from other positions which "are the same according to the job description" (App. C p. 35) when the employing agency takes other actions which are logically inconsistent with the state of facts which the employing agency relies upon to argue the distinction between the positions?

2. May an employee of the United States who has a right to be retained under the statutes described above be deprived of his position when his position description has been distinguished from others which "are the same according to the job description", and with which it was classified before the distinction, without any evidence of administrative action except a falsified position description? (See Box 9, App. D p. 11 and Box 9 App. E p. 12; both are dated June 9, 1970,

and are exactly the same except for Box 9, the competitive level code, but according to the agency the Code "LD" was not substituted for "PA" until after "early 1971", and there is no record of that administrative action.)

3. Does the Federal Personnel Manual, Chapter 351, Paragraph 4-3b(1) frustrate the intention of Congress to give preference to competing employees based on certain factors set forth in 5 U.S.C. Sec. 3502?

STATEMENT OF THE CASE

Although the terminology of competitive levels and position descriptions is unfamiliar to many persons, the facts of this case are very simple and an assimilation of those few and simple facts should make the questions presented for review transparent to the understanding in spite of their confusing nature on first impression.

The petitioner who had been employed by the Defense Intelligence Agency as an intelligence research specialist for several years was promoted into position #0152 (Position A) in June of 1970. At that time Position A was for an Intelligence Research Specialist (Cultural Geography) and it was in the same competitive level as position #8520 (position B) and position #5356 (position C). Positions B and C were for Intelligence Research Specialists (Urban Affairs), but Positions A, B, and C all had the same competitive level, "PA". Each of the positions A, B, and C covered a different geographical area. Then sometime between "early 1971" and March of 1972, in Box 9 of each of the three position descriptions A, B, and C, the

competitive level code was erased by some means and position A was given a new code "LD" and positions B and C were given the code "JD". The position descriptions were changed in no other way and continued to carry dates from 1968 and 1970. In March of 1972, the petitioner was notified that his position would be eliminated along with two other positions in "LD". No positions in "JD" were eliminated. Then in June of 1972 the petitioner's job was eliminated and the agency said position A was different from B and C because A was "Cultural Geography" and a generalist position and B and C were "Urban Affairs" and specialist as opposed to generalist. Then in July of 1972, the action was initiated which made position C into position #72643 (position D), Intelligence Research Specialist (*Cultural Geography*), a *generalist* position while leaving it in the same competitive level as positions B and C, with the same competitive level code "JD". This last action is the one which the petitioner asks the Court to note well. The Appeals Examining Office and the Board of Appeals and Review of the United States Civil Service Commission both upheld this agency's action and the United States Court of Claims, without stating its reasons, granted the motion of the United States for Summary Judgment on these facts as they are more fully explained in the record. It is this action which has been upheld by the Court of Claims that the petitioner claims to be so conspicuously arbitrary and capricious.

The government has admitted that the petitioner's "official job description [A] had all the qualifications required for an incumbent of positions #8520 [B] and #5356 [C]." However, it relies on paragraph 4-3.6(1) of Chapter 351 of the Federal Personnel Manual:

> For example, the agency readily might move a GS-3 typist trained in shorthand to a GS-3 stenographer position. Typist qualifications, however, are not stenographer qualifications, so GS-3 typist positions and GS-3 stenographer positions are in different competitive levels.

The petitioner contends that this regulations fails to effectuate the intention of Congress to give preference to competing employees under 5 U.S.C. Sec. 3502 because it does not take account of the right of a stenographer to compete with a typist, or, short of that, it does not provide adequate safeguards to prevent the use of additional (or additional and spurious) requirements to distinguish a position prior to abolishing it.

After the Government and the petitioner had both moved for summary judgment, the Government attempted to distinguish position A from positions B and C based on geographical considerations, even though positions A, B, and C were each in separate geographical categories which would, if proper, also require a distinction between B and C. Finally, the Government, without any reference to fact, drew up a hypothetical retention list, assuming unproved facts favorable to itself, which would have resulted in the petitioner's separation in the hypothetical case assumed by the Government, even if A, B, and C were in the same competitive level. Both of these last maneuvers were made after the petitioner disputed the Government's motion for summary judgment and made a cross-motion for summary judgment.

REASONS FOR GRANTING THE WRIT

The reasons for granting a writ of certiorari depend on grasping the petitioner's argument that he has raised substantial questions that have not, in fact, been considered by the court below and therefore require consideration by this Court in order to promote proper consideration of the litigation brought in federal courts and in order to consider a question which affects large numbers of federal employees. The petitioner's position is that the particular treatment given to him is a glaring example of arbitrary and capricious action and that, independently of the arbitrary and capricious action which has injured him particularly, the factual situation involved in his particular case points up an understandable, but nevertheless a gross, failure of the Civil Service Regulations, to give effect to the Congressional intent to protect competing employees.

The fact situation has to be understood fully, but the simple illustration given in the Statement of the Case, above, and to the Court of Claims should make clear the excessive irrationality the petitioner is challenging. This is illustrated by the fact that, first of all, A, B and C were in the same competitive level code, but then, after separating B and C from A, the Defense Intelligence Agency then rewrote C as position D which had all the characteristics of A which characteristics the agency was saying were characteristics which distinguished A from B and C. An objective person would say this made D interchangeable with A. Nevertheless, the agency said D was still in the same competitive level as B and C. This is the action which the petitioner contends involves a logical inconsistency and raises the

first of the questions presented for review. A proper rebuttal of this contention requires a cogent statement of the irrationality alleged by the petitioner and a showing of how the irrationality asserted by the petitioner does not exist. Of course, the petitioner may reject a rational rebuttal to his contentions, but his position now is that no person has answered his argument. *Search the record.* The only response anyone has ever made to this argument by the petitioner is on page 3 of the government's response filed on February 6, 1975:

> "Plaintiff's argument is without merit. Plaintiff's position, No. 0152, [A] and the position to which he refers, No. 72643 [D], were not interchangeable, as shown by the attached affidavit (Ex. III) of Mr. James P. Vincent, Position Classification Specialist, Civilian Personnel, Defense Intelligence Agency, dated January 22, 1975."

The petitioner should have a more adequate answer than that, but neither the Civil Service Commission nor the Justice Department, nor the Court of Claims have provided him with a response.

Moreover, the petitioner has pointed out that the position description which assigns position A a different competitive level from B and C (as well as D) is false because it carries a 1970 date when the record reflects that the code was assigned in 1971 or 1972. This is the falsified record which raises the second of the questions presented for review. Neither the Civil Service Commission, nor the Justice Department, nor the Court of Claims ever dealt with this argument about falsified records. (Positions B and C were subjected to falsifying actions too when they were classified "JD" in 1971 or 1972 carrying their 1968 dates.) Search the record again for any response to this contention.

These failures to consider arguments of arbitrary and capricious action give this Court a basis to grant a Writ of Certiorari. The petitioner concedes that the Court of Claims is not required to write an opinion in every case, but the petitioner has raised issues about arbitrary and capricious action which can fairly be said to require a response. If there is a good answer to what the petitioner argues, that answer has not been given yet. The courts of the United States inferior to this Court have a higher duty under the circumstances of a case like this than has been discharged here. Customarily, State Courts of Record with a larger volume of cases than the Court of Claims explain their decisions more adequately. The petitioner believes a review of this case would direct the attention of the Court of Claims to its duty in the case of each litigant that comes before it.

In addition, by raising the third question presented for review here, the petitioner is raising a question which affects every employee of the United States covered by 5 U.S.C. Sec. 3502. The government has cited paragraph 4-3.b(1) of Chapter 351 of the Federal Personnel Manual (quoted above) because of its contention that position A is like a stenographer position in comparison with B and C which are like typist positions (even though C became D, a stenographer-like position). The petitioner understands that argument and feels that it is mistaken because of the logical inconsistencies which occurred and because of the falsified record, but even without those it would be wrong for the reasons argued in the court below which are now restated here. Typist positions do not have the qualifications of stenographer positions. That is true. However – and this is the very significant fact which

the Civil Service Regulations ignore – stenographer positions do have the qualifications of typist positions. What the regulations mean is that there is no protection against defining positions so that the typist (manual and electric) will not be allowed to compete with the typist (electric). The petitioner has been the victim of a competitive level classification almost as absurd as the fanciful illustration. It is the possibility of reaching the result described by the fanciful illustration which demonstrates the failure of the administrative regulations to give a proper effect to the Congressional intention in enacting 5 U.S.C. Sec. 3502.

CONCLUSION

The petitioner has been deprived of his position under a Civil Service Regulation which fails in a significant way to give a rational and healthy effect to the Congressional intention to protect competing employees. Even if such a regulation is proper under the statute, the administrative actions which have affected the petitioner as an employee have been calculated to tempt an observer to cite Jonathan Swift, Franz Kafka, Joseph Heller or some other satirist or creator of the literature of the absurd. The petitioner is not yet confirmed in such an opinion. He still expects judicial relief. There are many controversies which are not best decided by courts. However, when administrators ignore plain facts and divorce themselves from reason, partly through their attachment to bureaucratic formulas which ignore reality and permit irrationality, then those administrative actions are

peculiarly appropriate for judicial review. It may be disputed whether this Court has always been correct in deciding the instances in which hearings should be a prerequisite to administrative action, but none of the decisions requiring hearings will have any practical effect unless the administrators are required to observe the facts and to act consistently with reason. This case will provide this Court with the opportunity to make that point. It will also correct a wrong that has been done to this petitioner.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX A

[Caption Omitted in Printing]

ORDER

This case comes before the court on cross-motions for summary judgment. Plaintiff demands lost wages resulting from his separation from Government service following a reduction-in-force in which his position was abolished. Plaintiff contends that he had a right to retention which was denied to him by unjustified personnel action. He claims that the competitive level to which he was assigned was not properly defined in accordance with applicable law and regulation, and that his agency, the Defense Intelligence Agency, Department of Defense, abused its discretion in defining the positions for which plaintiff was qualified during his employment and in the pertinent period thereafter. Plaintiff contested his separation and has exhausted his administrative remedies, unsuccessfully, before the Appeals Examining Office, Civil Service Commission, and before the CSC Board of Appeals and Review.

Plaintiff agrees that our review is limited to the questions of whether there has been substantial compliance with procedural requirements and whether the administrative action is so lacking in rational support as to be arbitrary, capricious, so grossly erroneous as to imply bad faith, or is not supported by substantial evidence. Plaintiff concedes that the administrative decisions are entitled to a presumption of correctness and that he has the burden of proof to

show that they are not correct. Plaintiff has well briefed and argued his contentions that his competitive level was not defined in accordance with applicable Civil Service Commission regulations and failed to give effect to the congressional intent to preserve the right of employees to retention, and that his agency abused the discretion allowed to it in defining positions during periods pertinent to plaintiff's employment. The court has carefully considered plaintiff's contentions but is not persuaded of their correctness. We find no violation of applicable law or regulations, no lack of substantial evidence as to the correctness of the adverse administrative decision by the Civil Service Commission, and no arbitrary, capricious or grossly erroneous action or bad faith which would vitiate that decision which we believe is entitled to finality under the circumstances of this case; nor do we find any material facts requiring a trial. We do not find it necessary to reach defendant's defense of mootness wherein defendant argues that plaintiff would have lost his job due to reduction-in-force even if the competitive level codes had been combined and his position and others had been assigned to the same level, as plaintiff urges.

IT IS THEREFORE ORDERED, upon consideration of the briefs, exceptions, and oral argument of the parties, and upon the authority of 5 U.S.C. §5105, *et seq.*, *Garrigan v. United States*, Ct. Cl. No. 454-73, order of April 25, 1975, *Wilmot v. United States*, 205 Ct. Cl. 666 (Dec. 1974), *DiRocco v. United States*, 201 Ct. Cl. 867 (1973), and *Bookman v. United States*, 197 Ct. Cl. 108, 116, 453 F.2d 1263, 1267 (1972), that defendant's motion for summary judgment be and

it is allowed, plaintiff's cross-motion for summary judgment is denied, and the petition is dismissed.

BY THE COURT

MAY 9 1975

/s/Byron Skelton
Byron Skelton
Judge, Presiding

REHEARING DENIED JUNE 27, 1975.

APPENDIX B

[Exhibit B]

UNITED STATES CIVIL SERVICE COMMISSION
BOARD OF APPEALS AND REVIEW

[Caption Omitted in Printing]

Dear Mr. Wood:

This is in further reference to your appeal from a decision of the Commission's Appeals Examining Office dated September 26, 1972. The Appeals Examining Office sustained the Defense Intelligence Agency, Washington, D.C., which by application of reduction-in-force procedures separated you from your position of Intelligence Research Specialist (Cultural Geography), GS-132-11, effective June 7, 1972.

In your appeal to the Board you renewed the contention which you made at the first level that your competitive level was excessively narrow. Specifically, you contend that the position of Intelligence Research Specialist (Urban Affairs), in organizational elements DI-3B2 (position #8520) and DI-4B2 (position #5356) should have been placed in the same competitive level as your position of Intelligence Research Specialist (Cultural Geography), (position #0152 in organizational element DI-5B2).

The record indicates that there are six specific subject-matter areas of specialization in intelligence research in the Defense Intelligence Agency. These subject-matters are urban areas, terrain, coasts and landing beaches, telecommunications, electric power, and petroleum, oil, and lubricants. An examination of your official position description shows that your duties included responsibility for intelligence research in the area of cultural geography, which *includes* the subject-matters of urban areas, telecommunications,

electric power, and petroleum, oil, and lubricants. The official position descriptions for positions #8520 and #5356 indicate that the duties for those positions were *limited to* intelligence research in the area of urban areas. This *difference* in the scope of the subject-matter areas of specialization was what the Appeals Examining Office meant when it referred to the difference in the thrust of the positions.

Chapter 351, subchapter 4-3 of the Federal Personnel Manual provides that:

> When an agency considers the effect of qualifications on the composition of a competitive level, its concern is *not with an incumbent's qualifications*, but with those required by the job's duties and responsibilities as stated in the *official job description*. [Emphasis added]

On the basis of the duties and responsibilities set forth in the job descriptions for positions #0152, #8520, and #5356, the Board finds that the skills and knowledges required for position #0152 are different from those required for positions #8520 and #5356; and therefore the positions are not interchangeable for purposes of establishing competitive levels. The Board therefore concurs in the decision of the Appeals Examining Office that the agency properly placed your Intelligence Research Specialist (Cultural Geography) position in a competitive level different from the position of Intelligence Research Specialist (Urban Affairs).

The Board of Appeals and Review, finding no violation of your reduction-in-force rights, hereby affirms the decision of the Appeals Examining Office. Section 772.307(c) of the Civil Service regulations provides that the decision of the Board is final and there is no further right of administrative appeal.

For the Commissioners:

* * *

William P. Berzak
Chairman

* * *

APPENDIX C

[Exhibit A]

[Caption Omitted in Printing]

Dear Mr. Wood:

Reference is made to your appeal of June 12, 1972 regarding the reduction-in-force action proposed by Defense Intelligence Agency, Washington, D.C., in its notice to you dated March 6, 1972 and effected on June 7, 1972 whereby you were separated from the position of Intelligence Research Specialist (Cultural Geography) (0152), GS-132, 11/4, $14,641 per annum.

We have reviewed the procedures used by your agency in conducting the reduction in force and have examined the retention register. Our review did not disclose any irregularity under the terms of the Commission's reduction-in-force regulations.

The records show that, on the basis of your official assignment, you were properly listed on the retention register, were within reach for reduction-in-force action in your competitive level, and received advance written notice to this effect as required by the reduction-in-force regulations.

* * *

You contend that your competitive level is excessively restrictive, stating that the positions in DI-4B2 and DI-3B2 are so similar to your position in DI-5B2 so as to be, in essence, interchangeable with your position and, therefore, belong in your competitive level.

The appropriate reference in this case is Section 351.403 of the Civil Service regulations which states in pertinent part:

> "Each agency shall establish competitive levels consisting of all positions in a competitive area and in the same grade or

occupational level which are sufficiently alike in qualification requirements, duties, responsibilities, pay schedules, and working conditions, so that an agency readily may assign the incumbent of any one position to any of the other positions without changing the terms of his appointment or unduly interrupting the work program."

In connection with this matter, your agency has certified that the positions to which you referred are covered by position descriptions numbered 8520 and 5356.

You seem to be of the opinion that your position and the two cited positions should be in the same competitive level because similar cultural geographic functions are performed within the Directorate of Intelligence as indicated by the use of the same organization nomenclature (the separate organizational elements in which the positions are located have Cultural Geography Sections under Military Geography Branches), and because no greater specialized knowledges are required to work in DI-4B2 and DI-3B2 (locations of the two positions cited) than in DI-5B2 (location of your position) as has been demonstrated in the past when there were direct transfers of personnel from DI-5B2 to DI-3B2.

You occupied the position of Intelligence Research Specialist (Cultural Geography) GS-132-11, located in the Military Geography Division, Cultural Geography Section DI-5B. According to your job description, PD No. 0152, you were responsible for participation in all phases of development and presentation of intelligence related to cultural geography and its military implications for a geographical area.

You had the basic responsibility for development and presentation of cultural geography intelligence for a group of countries within your assigned geographical area. You collected and processed data; reviewed, analyzed, and evaluated all incoming material and selected and synthesized all relevant material for inclusion in a current and accurate file; prepared and/or guided the preparation of intelligence studies, including basic descriptive studies, special

studies of strategic or tactical level requested by Defense and nondefense government agencies in support of planning for both long-range and specific military operations or for special activities, and current intelligence reports and articles for dissemination through such publications as the Defense Intelligence Digest; prepared special lectures and briefings; reviewed outside studies and reports; and maintained liaison with counterparts in other agencies.

Position No. 8520 and Position 5356 are both titled Intelligence Research Specialist (Urban Areas) and are both in Cultural Geography Sections. Position No. 8520 is in the Soviet/Warsaw Pact Area, DI-3B2, and Position No. 5356 is in the Eastern Area, DI-4B2. Both are responsible for the performance of comparable urban intelligence research duties and responsibilities in their geographic areas viz., collection and processing of data, preparing and/or guiding the preparation of intelligence studies, preparing special lectures and briefings, reviewing outside studies and reports, etc.

In terms of the intelligence process, all three positions are the same according to the job description. However, according to the record, the thrust of the positions are different, and require different knowledges and abilities. To explain this difference, the agency offered the following explanation:

Prior to 1970, military capability, environmental and transportation substantive intelligence was produced through four geographical divisions of the Soviet/Warsaw Pact Area, Eastern Area, Western Area and Latin American Area Divisions. Within each Division, there was an Environment Branch divided into four subject-matter Sections: Coasts and Landing Beaches, Urban Area, Terrain, and a Telecommunications, Electric Power/Petroleum, Oil and Lubricants Section.

In 1970, because of budgetary/manpower cuts, the Latin America Area Division (DI-6) was combined with the Western Area Division

(DI-5) to form the present Western Area Division (DI-5). DI-5 production responsibilities now encompass 122 countries. This resulted in a significant increase in the required degree of expertise from the analyst which must be demonstrated on a day-to-day basis in contracts with major users of end products. In order to meet program objectives with available manpower resources, the Division Chief undertook a complete internal realignment of the DI-5 Environmental program. The reconfigured Environment Branch became the Military Geography Branch. The Branch was divided into the Physical Geography Section and the Cultural Geography Section. The Cultural Geography Section absorbed the DI-5 and DI-6 Urban Areas and Telecommunications, Electric Power and POL organizations. The Physical Geography Section absorbed the DI-5 and DI-6 Coasts and Landing Beaches and Terrain functions. The individual analyst assignments were restructured along "generalist" lines so that each position involved working across-the-board on various program activities. The positions were given corresponding titles of IRS (Physical Geography) and IRS (Cultural Geography) within their respective sections. It was envisioned that considerable training would be required before the program could be considered to be fully and effectively implemented.

Separate competitive level codes were assigned for the IRS (Physical Geography) and IRS (Cultural Geography) jobs and for the environmental positions in DI-3 and DI-4, because the DI-3 and DI-4 jobs were still functioning under the traditional parenthetical specializations of (Terrain), (Coasts and Landing Beaches), (Urban Areas) and (Telecom, Electric Power and POL). This decision was based on the fact that (a) the new positions involved a combination of program functions/specializations not found elsewhere in the Agency, (b) the new assignments involved application of a combination of knowledges and skills not common to any other Agency position, and (c) the new positions would require considerable training before they could be considered fully operative as projected. In addition, there is a difference in the area

of geographic coverage across the organizational lines of the three Divisions with concomitant variations of a cultural, ethnic, and technological nature.

After consideration of the agency's explanation for establishing separate competitive levels, we believe the agency's determination that your position is not mutually interchangeable with the two cited positions is proper. While you might be able to do the work of the two cited positions, the incumbents of the two positions could not perform the work of your position without undue interruption of business in view of the differences in functions, geographic area, and knowledges and skills required.

In view of the above analysis, we must dismiss this contention.

In view of the above we must conclude that there was no violation of your rights under the Commission's reduction-in-force regulations. Therefore we cannot sustain your appeal.

* * *

Herman D. Staiman, Chief,
Appeals Examining Office

Enclosure 2 03547 - 2nd Ed

DEFENSE INTELLIGENCE AGENCY POSITION DESCRIPTION (DIAR 22-22)	1. ORGANIZATION DIA Military Geography Division (DIAAP-5B2)	2. P.D. NUMBER 0152
3. CERTIFICATE OF ACCEPTABLE STANDARDS AND ITS DATE OF ISSUANCE	4. TITLE Intelligence Research Specialist (Cultural Geography)	
	5. PAY SCHEDULE GS	6. OCC CODE 132
	8. FUNCTION CODE	9. CLC PA

Box 10. Supervisory Controls, Major Duties and Responsibilities, Qualification Requirements, etc., Omitted in Printing.

11. SUPERVISOR'S CERTIFICATION	12. POSITION CLASSIFICATION ACTION
THIS POSITION DESCRIPTION ACCURATELY DESCRIBES THE WORK ASSIGNED AND REQUIRED IN ONE POSITION OR IN EACH OF A GROUP OF POSITIONS IN THE ABOVE ORGANIZATION. SIGNATURE OF RESPONSIBLE SUPERVISOR DATE 6-9-70	Title, pay schedule, code and grade of this position have been fixed in accordance with U. S. Civil Service Commission and Defense Intelligence Agency official policy and grade level standards. SIGNATURE OF POSITION CLASS. SPECIALIST DATE 6-9-70

13 ANNUAL POSITION REVIEW RECORD								
Supervisor's Review and Certification of Accuracy	Date				Position Classification Specialist's Audit or Review	Date			
	Initials					Initials			

14 KIND OF POSITION ACTION		
New Description ☐	Replacement for Description Number _____	Series and Grade _____

DA FORM 369 May 1969 OFI [illegible]

POOR COPY

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DEFENSE INTELLIGENCE AGENCY POSITION DESCRIPTION (DIAR 22-22)	1. ORGANIZATION DIA Military Geography Division (DIAAP-5B2)	2. [illegible] 0152
CITATION TO APPLICABLE STANDARD AND ITS DATE OF ISSUANCE	3. TITLE Intelligence Industrial Specialist (Cultural Geography)	
	5. PAY SCHEDULE GS	6. OCC CODE 132
	8. FUNCTION CODE	9. CSC LD

Box 10. Supervisory Controls, Major Duties and Responsibilities, Qualification Requirements, etc., Omitted in Printing.

SUPERVISOR'S CERTIFICATION	12. POSITION CLASSIFICATION ACTION
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FINAL ACTION			RECORD
Supervisor's Review & Certification of Accuracy	Date		Position Classification Specialist's Audit Review
	Initials		

KIND OF POSITION ACTION

☐ New Description Replacement for Description Number _____ Series and G. _____

FORM 300 May 1969

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§ 3502. Order of retention

(a) The Civil Service Commission shall prescribe regulations for the release of competing employees in a reduction in force which give due effect to–

(1) tenure of employment;

(2) military preference, subject to section 3501(a) (3) of this title;

(3) length of service; and

(4) efficiency or performance ratings.

In computing length of service, a competing employee–

(A) who is not a retired member of a uniformed service is entitled to credit for the total length of time in active service in the armed forces; and

(B) who is a retired member of a uniformed service is entitled to credit for–

(i) the length of time in active service in the armed forces during a war, or in a campaign or expedition for which a campaign badge has been authorized; or

(ii) the total length of time in active service in the armed forces if he is included under section 3501(a) (3) (A), (B), or (C) of this title, and

(C) who is an employee in or under the Department of Agriculture is entitled to credit for service rendered as an employee of a county committee established pursuant to Section 590h(b) of title §6, or a committee or an association of producers described in Section 610(b) of title 7.

(b) A preference eligible employee whose efficiency or performance rating is "good" or "satisfactory" or better than "good" or "satisfactory" is entitled to be retained in preference to other competing employees. A preference eligible employee whose efficiency for performance rating is below "good" or "satisfactory" is entitled to be retained in preference to competing nonpreference employees who have equal or lower efficiency of performance ratings. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 428.

COPY PRINTED CLOSE TO EDGE

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-327

DONALD H. WOOD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of the decision of the Court of Claims sustaining his separation from government service as the result of a reduction-in-force.

Until 1972, petitioner was employed as an "Intelligence Research Specialist (Cultural Geography)" with the Defense Intelligence Agency of the Department of Defense. In that year, petitioner was separated from government service following a reduction-in-force which abolished his position. Petitioner contested his separation and unsuccessfully pursued his

administrative remedies before the Appeals Examining Office of the Civil Service Commission ("the Commission") and the Commission's Board of Appeals and Review.

Petitioner then brought this action for lost wages in the United States Court of Claims. The court granted the government's motion for summary judgment and dismissed the petition, stating (Pet. App. 2a):

> We find no violation of applicable law or regulations, no lack of substantial evidence as to the correctness of the adverse administrative decision by the Civil Service Commission, and no arbitrary, capricious or grossly erroneous action or bad faith which would vitiate that decision * * *.

The decision of the court below was correct, and petitioner has advanced no claim warranting further review by this Court.

Petitioner contends (Pet. 4, 6) that his separation was improper because the Defense Intelligence Agency failed to classify his position as "Intelligence Research Specialist (Cultural Geography)" in the same competitive level with two allegedly interchangeable positions, denominated "Intelligence Research Specialist (Urban Affairs)".[1] He asserts that the agency excessively restricted his competitive level and

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[1] In a reduction-in-force, employees compete for retention only within their competitive level and competitive area. 5 C.F.R. 351.201(a), 351.402(a), 351.403(a). Petitioner does not challenge the Commission's determination of his proper competitive area.

that its failure to permit him to compete for those two positions was arbitrary and capricious.

The applicable reduction-in-force regulation, 5 C.F.R. 351.403, provides that different positions should be placed in the same competitive level only when they are sufficiently alike in qualification requirements, duties, responsibilities, pay schedules, and working conditions that an agency readily may assign the incumbent of any one position to any of the other positions without changing the terms of his appointment or unduly interrupting the agency's work program. The Defense Intelligence Agency found that petitioner's position was not mutually interchangeable with the other positions cited by him. The Commission's Appeals Examining Office sustained this finding, concluding that while petitioner might be able to do the work of the two cited positions, the incumbents of those positions could not perform the duties of his position without undue interruption of the Agency's business because of the difference in functions, degree of geographic specialization, and required knowledge and skills (Pet. App. 2b). The administrative record amply supports this determination (Pet. App. 3c-5c). See *Bortin* v. *United States*, 138 F. Supp. 251 (Ct. Cl.); *Barberi* v. *United States*, 144 Ct. Cl. 573. Therefore, the court below properly held that the Commission's decision was not arbitrary and capricious.

Petitioner also contends (Pet. 7) that his position was distinguished from the two allegedly interchangeable positions by a falsified competitive level descrip-

tion, purportedly entered after the completion of the remainder of his position description. But the circumstances under which the Defense Intelligence Agency determined the competitive levels of these positions, which are described in the administrative record (Pet. App. 3c-5c), fully establish that there was no impropriety in the reclassification of petitioner's former position. Petitioner's contrary assertion raises a purely factual question that does not warrant review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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IN THE

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OCTOBER TERM, 1975

No. 75-327

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Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY TO MEMORANDUM OF THE UNITED STATES IN OPPOSITION

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The United States has filed an opposition to the petition for writ of certiorari which does not present any debate on the substance of the issues raised in the petition and this failure to debate the issues the petitioner has raised emphasizes the reasons why a writ should be granted and also makes a reply unnecessary. However, the United States has made one assertion, to which the Court's attention should be directed.

The Court should note that this is a petition for writ of certiorari to review an order granting a motion for

summary judgment. In defense of that summary judgment, the United States now argues (Memorandum in Opposition, page 4):

> "But the circumstances under which the Defense Intelligence Agency determined the competitor levels of these positions, which are fully described in the administrative record (Pet. App. 3c-5c), fully establish that there was no impropriety in the reclassification of petitioner's former position. Petitioner's contrary assertion *raises a purely factual question* that does not warrant review by this Court." (Emphasis supplied.)

This new argument of the United States is contradictory and inconsistent with the defense of an order granting summary judgment. See *Dombrowski v. Eastland*, 387 U.S. 82, 84, 87 S.Ct. 1425, 1427, 18 L.Ed.2d 577 (1967).

Accordingly, the Court is respectfully asked to grant a writ of certiorari.

Respectfully submitted,

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